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No. 95-137

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CHARLES L. WILLIAMS, *et al.*,

Petitioners,

—v.—

NATIONAL BASKETBALL ASSOCIATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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May 28, 1996

QUESTION PRESENTED

Whether employers who bargain together as a single unit can be subject to an antitrust challenge by their employees for continuing in effect the terms and conditions of employment set forth in an expired collective bargaining agreement in compliance with their obligation under the federal labor laws to maintain the *status quo* during the collective bargaining process.

RULE 29.1 LISTING

Ackerley Communications, Inc.
ARA Group, Inc.
ARA-RBI, Inc.
Bank of Nova Scotia
Boston Celtics Limited Partnership
Cablevision Systems Corporation
Clear Channel Communications, Inc.
Comcast Corporation
COMSAT Denver, Inc.
COMSAT Video Enterprises, Inc.
Dial Corporation
El Dorado Corporation
International Bancshares Corporation
ITT Corporation
ITT Sheraton Corporation
Kinetic Concepts, Inc.
Southwest Business Corp.
Southwestern Bell Corporation
Turner Broadcasting System, Inc.
USAA
Valero Management Company
Valero Texas Pipeline, L.P.

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No. 95-137

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October Term, 1995

CHARLES L. WILLIAMS, *et al.*,

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ON PETITION FOR A WRIT OF CERTIORARI
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BRIEF IN OPPOSITION

On May 8, 1996, respondents filed a memorandum requesting that the Court defer consideration of the petition for a writ of certiorari until it has rendered a decision in *Brown v. Pro Football, Inc.*, No. 95-388, a case that was argued on March 27, 1996 and is now *sub judice*. That application was denied, and this brief is submitted in accordance with the Court's request for a response to the merits of the petition.

COUNTERSTATEMENT OF THE CASE

The National Basketball Association ("NBA" or "League"), comprised of 29 member teams, is an integrated business venture that engages in the production and

marketing of NBA Basketball. Because of the necessity of uniform terms and conditions of employment governing players in professional team sports, the NBA, for the past 30 years, has bargained as a single unit with the union representing NBA players, the National Basketball Players Association ("NBPA" or "Union"). Since the NBA and the NBPA commenced their labor relationship in 1965, they have entered into twelve consecutive collective bargaining agreements. The parties' 1988 Collective Bargaining Agreement expired by its terms on June 23, 1994.

At the outset of the 1994 negotiations, the NBPA demanded, among other things, the immediate elimination of three long-standing NBA employment terms that had been incorporated in the 1988 Agreement -- the NBA Draft, Revenue Sharing/Salary Cap System, and Right of First Refusal.[1] The NBPA expressly threatened -- as it had done in prior rounds of collective bargaining -- that if the League so much as maintained these employment terms in effect while the parties bargained toward a new agreement, the Union would organize and finance an antitrust lawsuit against the NBA seeking injunctive relief and treble damages. In light of this effort by the Union to use the antitrust laws as leverage in collective bargaining, the NBA itself filed this declaratory

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[1] The NBA Draft is the method by which the negotiating rights to the best collegiate and other incoming players are allocated among NBA teams; the teams with the worst won-loss records generally receive the best selections. The Revenue Sharing/Salary Cap System is an overall wage system that allocates to the players as a whole an agreed-upon percentage of the League's gross revenues, and requires teams to establish their player payrolls in accordance with an agreed-upon maximum and minimum team salary. The Right of First Refusal permits a team to match an offer made to one of its current players by another team and thus to retain that player's services. Pet. App. A3.

judgment action against the NBPA and its members seeking a declaration that the parties' dispute over terms and conditions of employment was governed exclusively by the federal labor laws, and not the antitrust laws. The NBPA and the player-class immediately filed antitrust counterclaims for injunctive relief and treble damages.

On July 18, 1994, the district court granted the declaratory relief sought by the NBA and denied the NBPA's counterclaims. The court held that "where a collective bargaining relationship exists, federal labor law applies to the disputes that arise between the bargaining parties." Pet. App. A26. Accordingly, for so long as the collective bargaining relationship exists, "the continued implementation of these challenged measures by the NBA do[es] not violate the antitrust laws." Pet. App. A35. The district court also held that, on the merits, "the Players have failed to show that the alleged restraints of trade are on balance unreasonably anti-competitive." Pet. App. A37.

The Second Circuit affirmed. In a careful analysis of the interplay between the federal labor and antitrust laws and, in particular, the nature and purposes of multi-employer bargaining, the court concluded that the players' claim directly conflicts with "collective bargaining [as] intended by Congress." Pet. App. A17. In the Second Circuit's view, "the claim that the NBA Teams may not continue to impose the challenged provisions places the teams in an impossible position" because maintenance of the *status quo* until impasse is affirmatively required by the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"). Pet. App. A13. Moreover, the court found that the players' antitrust theory "collides head-on with the labor laws' endorsement of multi-employer collective bargaining," Pet. App. A8, which allows employers to act as a single unit in labor negotiations over terms and conditions of employment. Accordingly, the court expressly agreed with the Eighth Circuit's opinion in *Powell v. National Football League*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 489

U.S. 1040 (1991), holding that "the antitrust laws do not prohibit employers from bargaining jointly with a union, from implementing their joint proposals in the absence of a CBA, or from using economic force to obtain agreement to those proposals. What limits on such conduct that exist are found in the labor laws." Pet. App. A17.

REASONS FOR DENYING THE WRIT

The question presented in this case is whether employees who have formed a union and voluntarily invoked the collective bargaining process in order to obtain the most favorable terms and conditions of employment should, at the same time, be able to use the antitrust laws to challenge employer conduct that is a fundamental part of that process and is not only authorized but -- as is the case here -- required by the labor laws.

In answering this question in the negative, all three courts of appeal to have addressed the issue have advanced the same fundamental analysis: in the NLRA, Congress established a comprehensive and evenhanded process for the resolution of labor disputes; this process would be fatally undermined if courts, in the guise of determining antitrust "reasonableness," were allowed to intrude and outlaw employment terms or other conduct authorized by the labor laws; the business competition concerns of the Sherman Act are not directed at restraints in a labor market, especially those resulting from collective bargaining between unionized employees and a multiemployer unit; accordingly, by virtue of the so-called "labor exemption," the antitrust laws have no application to restraints on competition imposed through the collective bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining. Pet. App. A17; *accord Brown*, 50 F.3d 1041, 1056 (D.C. Cir. 1995); *Powell*, 930 F.2d 1293. As the government recognizes in its *amicus* filing here, there is no conflict among the courts of appeals. United States Brief ("U.S. Br.") at 11.

Indeed, while the issue presented here is whether the labor exemption protects from antitrust attack employer conduct *required* by the labor laws (maintenance of the *status quo*), the rationale articulated by each of those courts of appeals afforded that protection even to employer conduct *authorized* by the labor laws (post-impasse, unilateral implementation of new terms of employment).

Petitioners and their *amicus* attack the analysis adopted by the Second, Eighth and D.C. Circuits, but offer no coherent analytical framework to take its place. For example, petitioners contend that the labor exemption is predicated solely on union consent to the challenged restraint, *see* Petition for a Writ of Certiorari ("Pet. Br.") at 14-19, but then expressly concede that the antitrust laws cannot apply to a lockout or other applications of "economic force" -- "restraints" adopted pursuant to the labor laws to which a union does *not* consent. *See* Pet. App. A16; *Brown*, 50 F.3d at 1052. The government, after rejecting the "consent" theory, argues that antitrust courts should be free to intrude on the collective bargaining process immediately upon impasse, while at the same time acknowledging that Congress intended the labor law process to be free of exactly this kind of governmental interference. U.S. Br. at 10-11, 17; *see also* United States Brief in *Brown*, at 16. Ultimately, neither petitioners nor the government can resolve the fundamental incompatibility between an antitrust cause of action, which is intended to redress or prohibit unreasonable restraints on competition in a business market, and the labor law process, which obligates the parties to discuss -- and is intended to help them agree upon -- these self-same restraints in a labor market.

There is no dispute that the Sherman Act must yield to the later-enacted NLRA if the application of the antitrust laws affirmatively conflicts with the NLRA's collective bargaining scheme. Pet. App. A6; *Brown*, 50 F.3d at 1054-55. But the proposals advanced by petitioners and their *amicus* for termination of the labor exemption would create just such a

conflict. The claim that the exemption should terminate at expiration of the collective bargaining agreement conflicts with the employers' labor law obligation to maintain the *status quo* until impasse. The government's claim that the exemption should terminate at impasse conflicts with the employers' continuing right to maintain the *status quo* and the parties' fundamental duty to bargain in good faith over mandatory subjects. Both arguments also conflict with the well-settled practice of multiemployer bargaining, especially in a professional sports league like the NBA (or the NFL) where the member teams *must* establish common employment terms to produce their integrated entertainment product.

Petitioners' arguments are also based on a wholly unfounded premise: that unionized employees have an antitrust right to negotiate their salaries and other employment terms on an individual basis. As the NLRA makes clear, however, once employees have selected a union to act as their exclusive bargaining representative, those employees must negotiate their terms and conditions of employment only on a *collective* basis; thus, any right they may acquire to engage in individual salary negotiations derives solely from the labor law process. In their more candid moments, petitioners concede the point: the purpose of player antitrust litigation is not to vindicate any underlying antitrust rights or to further antitrust policy, but to obtain additional leverage at the bargaining table. *See* Petitioners' Brief in the Second Circuit, at 27-28. Because, as a practical matter, labor-management disputes over terms and conditions of employment must inevitably be resolved pursuant to the policy and process of the federal labor laws, such disputes raise no issue of antitrust policy at all.

Petitioner's assertion that the absence of the antitrust weapon will lead to increased disruption in labor-management relations is also fundamentally misconceived. The "disruptive" conduct about which petitioners complain -- strikes, lockouts, and other uses of economic force -- is both

permitted and regulated by the NLRA. If Congress believed that such action warranted intervention by the federal courts, rather than continued adherence to the collective bargaining process, it would have provided such a remedy in the federal labor laws. In any case, petitioners have it exactly backwards: it is the presence, not the absence, of wasteful, burdensome, and time-consuming antitrust litigation that has disrupted the orderly process of negotiating and resolving collective bargaining agreements in the professional sports industry.

Finally, the issues presented by the petition may well be resolved or rendered moot by this Court's decision in *Brown*, which was argued on March 27, 1996 and is now *sub judice*. In *Brown*, petitioners have expressly urged the Court to reverse the decision there under review and to adopt a legal standard that could overturn the decision rendered below. *See* Brief for Petitioners, No. 95-388. Respondents here have urged the Court to affirm the decision under review in *Brown*, a course that would require affirmance of the decision below. *See* Brief of the National Basketball Association as *Amicus Curiae* in Support of Respondents, No. 95-388. For the reasons discussed at length below and in light of the pendency and status of *Brown*, the petition for a writ of certiorari should be denied.

I. ALLOWING UNIONIZED EMPLOYEES TO USE ANTITRUST LITIGATION AS A WEAPON IN COLLECTIVE BARGAINING WOULD CLEARLY CONFLICT WITH THE EVENHANDED PROCESS FOR RESOLVING LABOR DISPUTES ESTABLISHED BY CONGRESS IN THE NLRA

A. The Antitrust Laws Cannot Apply To Collective Bargaining Conduct If They Conflict With The Federal Labor Laws.

Even if the Sherman Act was intended to apply to labor market restraints or, more particularly, to multiemployer bargaining conduct (which it plainly was not, *see* Brief for the Respondents in Opposition in *Brown*), the relevant inquiry in this case is whether the application of the antitrust laws to restraints imposed in a unionized labor market would conflict with the collective bargaining process established by the labor laws. This Court recognized the clear potential for such a conflict in its early labor exemption decisions when it concluded that, even with respect to restraints in a *product* market, the antitrust policy favoring free competition in business markets must occasionally give way to the labor law policy favoring collective bargaining in accordance with the NLRA. *See Local Union 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676, 689 (1965); *id.* at 711-12 (opinion of Goldberg, J.) ("To tell the parties that they must bargain about a point but may be subject to antitrust penalties if they reach an agreement is to stultify the congressional scheme."). As the Second Circuit cogently summarized, "no one seriously contends that the antitrust laws may be used to subvert fundamental principles of our federal labor policy as set out in the National Labor Relations Act." *Wood v. National Basketball Ass'n*, 809 F.2d 954, 959 (2d Cir. 1987).

B. Application Of The Antitrust Laws At Expiration Of The Collective Bargaining Agreement Would Conflict With The Labor Laws.

Petitioners' initial position is that the antitrust laws should attach immediately upon expiration of a collective bargaining agreement for any term or condition of employment maintained in effect by the multiemployer unit. Pet. Br. at 14. This extreme argument, which finds support only in the district court's decision in *Brown*, 782 F. Supp. at 130-34, has been rejected not only by the government in this very case, U.S. Br. at 10-11, but also by every other court to address the issue.[2]

The reason is plain: under the *Katz* doctrine established by the NLRB and endorsed by this Court, employers are *required* to maintain in effect previously-bargained terms of employment following the expiration of a collective agreement, at least until the parties reach a bargaining impasse. *See NLRB v. Katz*, 369 U.S. 736, 743-43 (1962); *accord Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991); *Brown*, 50 F.3d at 1054 n.7. "`Freezing the status quo ante after a collective agreement has expired promotes industrial peace by fostering a non-coercive atmosphere that is conducive to serious negotiations on a new contract.'" *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 545 n.6 (1988) (quoting opinion below). A contrary rule would destabilize the process and polarize the parties. As the district court stated, "[o]ne can easily imagine the howls to be heard from the Players if the Teams unilaterally terminated medical

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[2] See Pet. App. A13-14, A34; *Brown*, 50 F.3d at 1056; *Powell*, 930 F.2d at 1303; *Powell v. National Football League*, 678 F. Supp. 777, 778 (D. Minn. 1988); *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960, 966 (D.N.J. 1987).

coverage for them and their families at the formal expiration of the Collective Bargaining Agreement." Pet. App. A28. In short, conduct that is required by the federal labor laws cannot violate the antitrust laws.

Underlying petitioners' thoroughly-discredited argument that the antitrust laws attach at expiration (as well as their subsequent argument that the antitrust laws attach at impasse) is the theory that employee consent forms the basis for the labor exemption. But that theory is demonstrably false. As established in detail in the NFL's brief in *Brown*, the labor exemption does not exist to protect employees (as petitioners wrongly contend, Pet. Br. at 15), or to protect employers; rather, it arises out of, and is designed to protect, the comprehensive and evenhanded framework for resolving collective bargaining disputes established by Congress in the federal labor laws. It would be a bizarre result, indeed, if this carefully-crafted scheme for resolving labor disputes were to be free from antitrust interference only when a union does *not* dispute the prevailing terms and conditions of employment.

For this reason, petitioners' contention below that a union can unilaterally waive an employer's *status quo* obligation has no legal basis. The *Katz* doctrine, like the parties' mutual obligation to bargain in good faith, is imposed by the labor laws in order to foster the *process* of collective bargaining, not the achievement of any one side's bargaining demands.

Petitioners themselves delivered the final blow to their "consent" theory when they conceded at oral argument in the Second Circuit that the antitrust laws do not apply to a lockout or other so-called "bargaining conduct". *See* Pet. Br. at 13-14 & n.16. Such employer conduct, of course, occurs *without* union consent and, indeed, over a union's adamant objections. Nevertheless, as petitioners, the dissent in *Brown*, and numerous courts have acknowledged, lockouts and similar employer conduct are expressly authorized by the

federal labor laws and are therefore not within the purview of the antitrust laws. Pet. App. A16; *Brown*, 50 F.3d at 1068 n.7 (citing cases). In the face of this concession, petitioners' "consent" argument can hardly be taken seriously.

C. Application Of The Antitrust Laws At Impasse Would Conflict With The Labor Laws.

Petitioners advanced the alternative argument below that the antitrust laws should attach no later than when the parties have reached the first impasse in negotiations. This contention fails at the outset for the reason discussed above: namely, that the labor exemption does not arise from union consent, but rather from the congressional policy favoring collective bargaining as the exclusive method for resolving labor disputes.

Petitioners' argument also presumes that impasse signals the end of the collective bargaining process and the governing authority of the labor laws. But in *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404 (1982), this Court clearly rejected that notion:

> As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations "which in almost all cases is eventually broken, through either a change of mind or the application of economic force." Furthermore, an impasse may be "brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process." Hence, "there is little warrant for regarding an impasse as a rupture of the bargaining relation which leaves the parties free to go their own ways."

Id. at 412 (quoting *Bonanno Linen*, 243 N.L.R.B. 1093, 1093-94 (1979); citations omitted); *accord, e.g., Hi-Way Billboards, Inc.*, 206 N.L.R.B. 22, 23 (1973) (impasse "is merely a momentary eddy in the flow of collective bargaining"), *enforcement denied on other grounds*, 500 F.2d 181 (5th Cir. 1974).

The labor laws and the collective bargaining process remain in full force and effect after impasse. Most importantly, the existence of an impasse does not permanently relieve either party of its statutory duty to bargain in good faith; to the contrary, that duty is only temporarily suspended at impasse, and is reactivated by "any changed condition or circumstance" -- such as a strike, lockout, change of mind, or change of economic fortune. I Patrick Hardin, *The Developing Labor Law* 697 (3d ed. 1992); *accord, e.g., Retlaw Broadcasting Co.*, 1994 NLRB LEXIS 1074, *17-18 (Dec. 30, 1994) ("The bargaining process, itself, contemplates that passage of time following [an impasse] will lead one or the other party to modify its position(s) on deadlock issues, and, once that occurs, all parties are obliged to resume negotiations in a renewed effort to reach agreement on terms for a collective-bargaining contract."); *Hi-Way Billboards, Inc.*, 206 N.L.R.B. at 23 (the use of "economic pressure" usually breaks a bargaining impasse and "revives the parties' duty to bargain").

Further, the existence of an impasse does not affect either side's labor law duty to disclose relevant information. *Retlaw Broadcasting Co.*, 1994 NLRB LEXIS 1074 at *18 (citing, *e.g., Whitin Machine Works*, 108 N.L.R.B. 1537, 1541, *enf'd*, 217 F.2d 593 (4th Cir. 1954), *cert. denied*, 349 U.S. 905 (1955)). Nor does an impasse allow an employer to withdraw from a multiemployer unit, *Bonanno Linen*, 454 U.S. at 412-13, or take action amounting to a withdrawal of recognition of the union's representative status, *see, e.g., Newspaper Printing Corp. v. NLRB*, 625 F.2d 956, 964-65 (10th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981). Finally, although the labor laws allow an employer to implement new employment terms at impasse, that right comes with an important limitation: namely, that

the employer may only implement such terms as are reasonably contemplated within its pre-impasse bargaining proposals. *See Laborers Health & Welfare Trust Fund*, 484 U.S. at 543 n.5; *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965). In short, there is simply no basis for treating impasse as anything other than a lawful intermediate stage of the collective bargaining process that will eventually give way to a resolution of the parties' labor dispute.

Application of the antitrust laws at impasse would also provide powerful incentives for employees to manufacture a stalemate in negotiations, in derogation of their obligation to bargain in good faith. The existence of such incentives was one reason that the Court in *Bonanno Linen* rejected the argument that the existence of an impasse warranted an employer's withdrawal from a multiemployer bargaining unit. *See Bonanno Linen*, 454 U.S. at 412 n.8 (accepting the NLRB's explanation that if withdrawal were allowed at impasse, "parties could precipitate an impasse in order to escape any agreement less favorable than the one expected").

This is no theoretical concern. On June 15, 1994, the NBPA notified the NBA that, in the Union's view, the parties had reached a bargaining "impasse" in their efforts to negotiate a successor to the 1988 Collective Bargaining Agreement. Such an impasse existed, asserted the Union, notwithstanding the facts that (i) the parties had by then held only *two* bargaining sessions (totaling five hours of negotiations) toward a new agreement, (ii) the parties had addressed only a few of the numerous open issues between them, and (iii) the 1988 Agreement was not even set to expire until June 23, 1994. By adopting the position that negotiations had broken down, the Union was clearly attempting to put itself in a position to assert -- under either *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960, 967 (D.N.J. 1987) (erroneously holding that the labor exemption terminates when the employer no longer has a "reasonable belief" that the challenged practice will be agreed upon by the union) or the

district court's decision in *Brown*, 782 F. Supp. at 134 (erroneously adopting impasse as an alternative standard) -- that various employment terms contained in the 1988 Agreement would now "`be subject to successful challenge under the antitrust laws.'" Pet. App. A24 (quoting NBPA position paper delivered on April 7, 1994). Because an impasse standard would encourage unions to pursue antitrust litigation, rather than collective bargaining, it would conflict with the labor law process established in the NLRA.[3]

An impasse standard would also be completely unworkable. A determination of impasse is a complex factual inquiry often enveloped in substantial uncertainty. *See Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967) (enumerating factors in evaluating impasse), *enf'd sub nom. American Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622 (1968). Neither the collective bargaining process, nor the antitrust laws, would be served by a test that requires the parties to guess precisely when the legal landscape will fundamentally change. These same infirmities are present in the government's proposed standard, under which the antitrust laws would begin to apply after the employer has been advised by counsel that a bargaining impasse exists and afforded sufficient time to "eliminate any previously immunized restraint." U.S. Br. at 18-19. Given the transitory and ephemeral nature of a bargaining impasse, counsel is in no better position than management to identify the precise point at which this event occurs and treble damage liability may begin to accrue. The government's impasse standard would also raise substantial problems of proof, including serious issues of attorney-client privilege.

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[3] The union representing NFL players engaged in a similar stratagem when it announced an impasse in negotiations with the NFL only one business day after the district court in *Powell* erroneously held that the antitrust laws attach at impasse. *See Powell*, 930 F.2d at 1296.

At bottom, there is no consistent rationale underlying an impasse standard. Petitioners acknowledge as much when they conceded that certain post-impasse conduct authorized by the labor laws – such as a lockout – would still remain subject to the labor exemption. Pet. App. A16. Thus, for an employer like the NBA that simply maintains the *status quo*, the same conduct that was legal on one day could become instantly illegal the next. Such a result would not only conflict with the congressional policy favoring collective bargaining, it would simply make no sense.[4]

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[4] Nor is the impasse standard rendered any more coherent by the unsupported distinction between bargaining "terms" and "tactics" suggested by the dissent in *Brown*, 50 F.3d at 1066. If an employer is satisfied with the *status quo* – for example, a wage scale that has not kept up with the cost of living – its post-impasse decision to maintain that employment term in effect could equally well be a "tool[] to put pressure on the other bargaining party to reach agreement" (the dissent's definition of an immunized bargaining "tactic") or "simply the way the employer decides to run his business in the absence of any bargaining agreement" (the dissent's definition of a non-immunized bargaining "term") – or both. *Id.* at 1068. The same is true of the employer's decision to implement a minimal wage increase that it had proposed prior to impasse. Nevertheless, the dissent in *Brown* concluded that an employer "can maintain the status quo" after impasse without fear of antitrust attack, but cannot similarly implement new employment terms. *Id.* at 1070. Again, such a standard simply makes no sense. *See also* NFL Brief in *Brown* (demonstrating that post-impasse implementation is fully authorized by the labor laws and, in any case, clearly considered to be an economic pressure tactic).

D. Application of the Antitrust Laws To Labor Market Restraints Would Conflict With Multiemployer Bargaining, Particularly Multiemployer Bargaining In Professional Sports.

There is "no doubt whatsoever" that petitioners' antitrust claim would fail if asserted against a single employer. 50 F.3d at 1055. Petitioners did not contest the point below, and neither they nor their *amicus* does so here. Thus, "[t]he only basis for the claim asserted by [the players] is that multiemployer bargaining is illegal." Pet. App. A14. It clearly is not. As this Court's decisions reflect, *see NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 94-96 (1957) ("*Buffalo Linen*"); *Bonanno Linen*, 454 U.S. at 409-10, nn.3-4, and the court below concluded (Pet. App. A9-16, quoted in *Brown*, 50 F.3d at 1055-56), Congress did not intend that multiemployer bargaining units be afforded any fewer rights under the labor laws than those available to a single employer. There is simply no basis for petitioner's contrary conclusion.[5]

The conflict between petitioners' antitrust claims and multiemployer bargaining is especially acute in the professional sports industry, where multiemployer bargaining is compulsory in nature. As the court below held, "sports leagues are an exception to the principle of voluntariness" that typically underlies multiemployer bargaining. Pet. App. A16. A professional sports league like the NBA, for example, must be able to ensure through collective bargaining that its teams play the

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[5] We do not detail here the numerous and substantial benefits afforded to both management and labor by the process of multiemployer bargaining. These benefits are discussed at length in both the Court's prior opinions and the Second Circuit's opinion below. Pet. App. A8-16.

same number of regular season games; it must equally be able to prohibit varying agreements between individual teams and their player-employees concerning when those games will be played (*e.g.*, an agreement that games will not be played at night) or where they will be played (*e.g.*, an agreement that games will only be played in warm weather cities). Further, because the NBA's product is athletic competition, it is essential that the League and its players agree on uniform employment terms -- such as the size of team rosters, the NBA Draft, the Salary Cap, and free agency rules -- designed to equalize each team's ability to compete through the acquisition and retention of player talent. Varying agreements between individual teams and their player-employees on these and similar matters would destroy the NBA's ability to produce its integrated and competitively balanced entertainment product.[6]

Petitioners' argument is therefore not supported by the assertion that, after expiration of a collective agreement or at impasse, individual member teams of a professional sports league could avoid multiemployer bargaining and independently negotiate interim agreements with their player-employees. Pet. Br. at 24 n.23. Indeed, the Fifth Circuit concluded

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[6] That the members of a professional sports league must act cooperatively in order to have any product to sell has been confirmed by this and other courts. *See, e.g., NCAA v. Board of Regents*, 468 U.S. 85, 101 (1984) ("league sports" is "[p]erhaps the leading example" of a business activity that "can only be carried out jointly"); *Reynolds v. National Football League*, 584 F.2d 280, 287 (8th Cir. 1978) ("Some leveling and balancing rules appear necessary to keep the various teams on a competitive basis, without which public interest in any sport quickly fades."); *Chicago Prof. Sports Ltd. Partnership v. National Basketball Ass'n*, 874 F. Supp. 844, 849 (N.D. Ill. 1995) ("Mutual agreement is *necessary* to create the `product' of competitive basketball games and to insure its quality.") (emphasis added).

that the member teams of a professional soccer league were a "joint employer" and therefore *required* to engage in collective bargaining as a unit. *See North Am. Soccer League v. NLRB*, 613 F.2d 1379, 1383 (5th Cir.), *cert. denied*, 449 U.S. 899 (1980). The NLRB reached a similar conclusion with respect to the NFL, finding that its teams "constitute a single employer for bargaining purposes." *National Football League Management Council*, 203 N.L.R.B. 958, 961 (1973), *rev'd on other grounds, National Football League Players Ass'n v. NLRB*, 503 F.2d 12 (8th Cir. 1974). Thus, petitioners' antitrust claims simply cannot be squared with the manner in which the collective bargaining process has operated and must operate in professional sports.

II. THIS CASE AND OTHER PLAYER ANTITRUST LITIGATION SERVES NO UNDERLYING ANTITRUST INTEREST, BUT IS SIMPLY INTENDED TO INCREASE THE PLAYERS' LEVERAGE IN COLLECTIVE BARGAINING

Petitioners' claims are premised on the theory that unionized employees have an "antitrust right" to negotiate their salaries on an individual basis. No such right exists. As this and other courts have confirmed (and as the NFL demonstrates in its merits brief in *Brown*), the antitrust laws were not intended to address restraints operating solely in a labor market, particularly those produced in collective bargaining between a union and a multiemployer bargaining unit.[7]

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[7] *See, e.g., Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 539-40 (1983) ("a union, in its capacity as bargaining representative, will frequently not be part of the class the Sherman Act was designed to protect, especially in disputes with employers with whom it bargains"); *Powell*, 930 F.2d at 1301 ("The Supreme

(continued...)

Moreover, the NLRA makes clear that unionized employees may negotiate their wages only on terms established through *collective bargaining*. *See* 29 U.S.C. § 158(d) (collective bargaining over wages is "the mutual obligation of the employer and the representative of the employees"); § 159(a) ("wages" are a mandatory subject of collective bargaining). This Court has so confirmed on at least two occasions, holding that the NLRA "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967); *accord J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944). Unionized professional athletes are

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[7](...continued)
Court has recognized that disputes over employment terms and conditions are not the central focus of the Sherman Act"); *Mid-America Regional Bargaining Ass'n v. Will County Carpenters Dist. Council*, 675 F.2d 881, 883 (7th Cir.) ("'[r]estraints operating on the primary [*i.e.*, labor] market are presumptively outside the scope of the Sherman Act'") (quoting *Consolidated Express, Inc. v. New York Shipping Ass'n*, 602 F.2d 494, 514 (3d Cir. 1979), *vacated on other grounds sub nom. International Longshoremen's Ass'n v. Consolidated Express, Inc.*, 448 U.S. 902 (1980)), *cert. denied*, 459 U.S. 860 (1982); *Amalgamated Meat Cutters and Butchers Workmen v. Wetterau Foods, Inc.*, 597 F.2d 133, 136 (8th Cir. 1979) (rejecting antitrust claim because the challenged "agreement had no anticompetitive effect unrelated to the collective bargaining negotiations"); *Plumbers & Steamfitters Local 598 v. Morris*, 511 F. Supp. 1298, 1306-07, 1311-12 (E.D. Wash. 1981) (dismissing union challenge to concerted employer action as not having effects that "Congress prohibited by enacting the Sherman Act"); *see also A. Cox, Labor and the Antitrust Laws – A Preliminary Analysis*, 104 U. Pa. L. Rev. 252, 254 (1955) ("No one seriously suggests that antitrust policy should be concerned with the labor market per se.")

where the union *and* the employer have so agreed as part of a *collective* bargaining agreement. Thus, for example, the collective agreement between the NBA and the NBPA provides that "notwithstanding" the NBPA's status as the exclusive bargaining representative of all NBA players, such players "may, on an individual basis, bargain with respect to and agree upon Player contracts, but only as and to the extent permitted by this Agreement." In short, the "individual bargaining" that petitioners seek in this lawsuit is "not an exercise of a right to free competition under the antitrust laws; rather, it is an exercise of a right derived from collective bargaining itself." *Caldwell v. American Basketball Ass'n*, 66 F.3d 523, 528 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1014 (1996).

Antitrust litigation of the kind pursued by professional athletes does not and cannot vindicate any policy underlying the Sherman Act. To the contrary, the labor disputes at the heart of such cases can only be resolved pursuant to the collective bargaining process. Thus, for example, the players' antitrust attack on the NBA Draft, Revenue Sharing/Salary Cap System, and Right of First Refusal in *Williams* was eventually resolved by the parties' agreement to a new 1995 Collective Bargaining Agreement (containing a modified version of all three employment "restraints"). The same result occurred in 1987, when the NBPA represented to the district court in *Bridgeman* that it would "never again agree" to the NBA Draft, Salary Cap, and Right of First Refusal, but then eventually agreed to modified versions of these very employment terms in the 1988 Collective Bargaining Agreement. *See* Pet. App. A22-24 (recounting collective bargaining history). Indeed, even if a mandatory subject of collective bargaining (such as a Salary Cap) were condemned by a court as an illegal "restraint of trade," the parties would still be obligated under the labor laws to engage in good faith negotiations about that term and could eventually agree to include it in their next collective bargaining agreement. (In *Brown*, for example, the salaries to be paid to members of Developmental

Squads are now determined in accordance with the 1993 NFL-NFLPA Collective Bargaining Agreement.)

The sole purpose of player antitrust litigation is to create leverage at the bargaining table. As the NBPA candidly acknowledged in its brief to the Second Circuit in *Williams*:

> [R]egardless of the outcome of litigation, some collective bargain will eventually be reached; no one believes that either the owners or the player will permanently choose to forego their mutually dependent business opportunities. Thus, allowing employees to pursue their Sherman Act claims will likely alter the substance of the collective bargain . . . .

Petitioners' Brief in the Second Circuit, at 27-28; *accord* U.S. Br. at 18. This fact puts the lie to petitioners' antitrust theory: the quest for additional leverage at the bargaining table simply cannot be squared with the congressional policy favoring "free competition in business markets" underlying the antitrust laws.

III. THE NBA'S EXPERIENCE IN COLLECTIVE BARGAINING ESTABLISHES THAT THE EXISTENCE OF PLAYER ANTITRUST LITIGATION, NOT ITS ABSENCE, UNDERMINES THE LABOR LAW PROCESS

Petitioners argue that player antitrust litigation has had a salutary effect on the collective bargaining process in professional sports, and that the exclusion of such lawsuits will lead to increased "strife" and "destablilization" in labor-management relations in the future. Pet. Br. at 22-23. That contention is utterly meritless.

First, the conduct about which petitioners complain -- strikes, lockouts, and other uses of economic force -- is both permitted and regulated by the federal labor laws. *See, e.g., NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962) (union's right to strike); *American Ship Building Co.*, 380 U.S. at 310-11 (employer's right to lock out or to implement new employment terms at impasse). As this Court has confirmed, "[t]he presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *NLRB v. Insurance Agents Int'l Union*, 361 U.S. 477, 489 (1960); *accord First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 678 (1981) (noting Congress' "belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole"). If petitioners are dissatisfied with the rights and remedies made available to labor and management in the collective bargaining process, their arguments should be made to Congress and not to federal antitrust courts.

Second, an accurate recitation of the history of collective bargaining in professional sports demonstrates that it is the presence, not the absence, of antitrust litigation that has disrupted the parties' efforts to resolve their disputes -- as they eventually must -- in accordance with the labor laws. In the latest round of collective bargaining in the NBA, for example, serious negotiations toward a multi-year agreement to succeed the parties' 1988 Collective Bargaining Agreement did not take place until December 7, 1994 -- more than five months after the 1988 Agreement expired on June 23, 1994, and fully eight months after the parties held their first formal bargaining session on April 7, 1994. Rather than engaging in collective bargaining during this period, the parties' efforts were solely devoted toward antitrust threats and litigation. In particular:

1. In April and May of 1994, the players threatened to sue the League if it merely continued in effect the NBA Draft, Salary Cap, and Right of First Refusal after the expiration of the 1988 Agreement. *See* Pet. App. A24.

2. In a June 15, 1994 letter, the NBPA predictably announced that the parties were at impasse, notwithstanding the fact that they had held only five hours of talks in two formal bargaining sessions. *See id.* at A24.

3. On June 17, 1994, and in order to protect itself against the NBPA's antitrust threats, the NBA commenced this action; ten days later, the NBPA and its members counterclaimed for injunctive relief and treble damages.

4. Over the next three weeks, the parties were involved in intense litigation: first, the players' request for a temporary restraining order prohibiting the signing of any further NBA player contracts (granted on June 28, 1994); then the players' motion for a preliminary injunction (heard and deferred on July 8, 1994); and finally an expedited trial on the merits (held July 12, 1994). *See* Pet. App. A4-5.

5. On July 18, 1994, the district court issued its decision in favor of the NBA. *Id.* Immediately thereafter, the NBA invited the NBPA to resume collective bargaining. The Union refused, stating in an August 3, 1994 memorandum to its members that "we do not expect to have any bargaining sessions with the League until the [Second Circuit] decides our appeal."

> 6. In late October 1994, with the scheduled start of the 1994-95 NBA season only weeks away, the NBPA agreed to discuss – and the parties eventually entered into – a one-year extension (with some modifications) of their 1988 Agreement. As a result of these discussions, the parties commenced bargaining toward a new multi-year agreement on December 7, 1994.

This was not the first time that efforts to negotiate a new NBA-NBPA collective bargaining agreement had been sidetracked by antitrust litigation. In 1987, serious negotiations toward a new agreement commenced only after a district court rejected the NBPA's claim that the League's maintenance of the *status quo* was subject to antitrust scrutiny. *See Bridgeman*, 675 F. Supp. at 967. As early as 1976, and again in 1982, the Union initially refused to bargain over certain disputed employment terms on the ground that they were antitrust violations.[8]

In each of these instances, the players' antitrust claims served only to distract the parties, poison their relationship, and delay the inevitable commencement of full-scale bargaining toward a new collective agreement. These and similar player lawsuits have also had the effect of draining scarce judicial resources, a particularly unfortunate result in light of Congress' clear contemplation "that neither the courts nor the National Labor Relations Board would intervene on a case-by-

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[8] Following the 1976 incident, the NLRB issued an Advice Memorandum concluding that each of the matters about which the NBA sought to negotiate (including, for example, the NBA Draft) was a mandatory subject of collective bargaining and that the NBPA's refusal to bargain over them would constitute an unfair labor practice. *National Basketball Players Ass'n*, 4 Adv. Mem. Rep. ¶ 10,037 (Jan. 26, 1976).

case basis to adjust the parties' relative bargaining power, but rather [would] leave them to fight it out at the bargaining table." *Brown*, 50 F.3d at 1064 (Wald, J., dissenting).

Finally, petitioners' predictions as to the disruptive effect of the decision below are equally erroneous. Labor-management relations in the NBA again prove the point. By June 14, 1995, the date on which the parties' one-year extension of the 1988 Collective Bargaining Agreement was set to expire, both the Second Circuit in this case and the D.C. Circuit in *Brown* had issued their decisions. Thus, on or after that date, the NBA could have manufactured a bargaining "impasse" (as petitioners suggest would occur, Pet. Br. at 23) and implemented new employment terms without fear of antitrust liability. But rather than following this course, the NBA agreed upon a brief extension of the parties' one-year agreement in order to facilitate further negotiations. As a result of this extension and virtually round-the-clock negotiations, representatives of the NBA and the NBPA were able to reach a new six-year collective bargaining agreement on June 21, 1995. The next day, the membership of the NBPA refused to ratify the pact, an act that (under the circumstances) clearly signaled a bargaining impasse. Again, however, the NBA did not implement the provisions of the June 21 agreement, but instead commenced a lockout of NBA players on July 1. This action -- which is clearly outside the scope of the antitrust laws -- had the effect of shutting down the NBA's business and thus putting pressure on both sides to reach a new deal. After several further concessions by the NBA, an agreement was reached on August 8, 1995 and subsequently ratified.

It is therefore clear that the decision below will not "destabilize" labor-management relations or provide management with "additional" economic weapons. To the contrary, that decision simply leaves the parties where they were before, with the full range of rights and remedies made available to them by the federal labor laws. This collective bargaining process, and not antitrust litigation, is what

Congress intended for the resolution of labor-management disputes when it enacted the NLRA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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